

## Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY NEW DELHI

INFO AMCONSUL CALCUTTA

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EO 11652: NA

TAGS: CASC

SUBJECT: CONSULAR ACCESS TO IMPRISONED NATIONALS

REFS: (A) NEW DELHI 10131; (B) CALCUTTA 310

1. PARA 2 REF A REQUESTED GUIDANCE FROM DEPARTMENT ON  
LEGAL BASIS FOR INSISTENCE BY CONGEN THAT CONVERSATIONS OF  
CONSULAR OFFICER WITH DETAINED US NATIONALS BE HELD IN  
PRIVATE. DEPARTMENT CAN LOCATE NO OFFICIAL PRECEDENT OR  
BINDING RULE OF INTERNATIONAL LAW REQUIRING THAT ALL SUCH  
CONVERSATIONS BE HELD IN ABSOLUTE PRIVACY, FREE OF ALL  
SUPERVISION OR OBSERVATION BY RECEIVING STATE AUTHORITIES.  
HOWEVER IN DEPARTMENT'S VIEW STRONG ARGUMENT CAN BE MADE  
THAT RIGHT EMBODIED IN ARTICLE 36 PARA (1)(C) OF  
VIENNA CONVENTION ON CONSULAR RELATIONS MAY ONLY BE ENJOYED  
IN MEANINGFUL WAY IF CONSULAR OFFICER ALLOWED BENEFIT  
OF PRIVACY WITH NATIONAL TO WHOM HE IS EXTENDING CONSULAR  
PROTECTION. FOR EXAMPLE, THE RIGHT TO ARRANGE FOR LEGAL  
REPRESENTATION OF THE NATIONAL AND THE COROLLARY RIGHT TO  
DISCUSS RELEVANT LEGAL ISSUES INVOLVED IN CONNECTION WITH  
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THE DETENTION COULD NOT BE EXERCISED EFFECTIVELY IF

RECEIVING STATE AUTHORITIES HAD THE RIGHT TO MONITOR THE CONTENTS OF THE CONVERSATION.

2. ON THE OTHER HAND, ARTICLE 36(2) PROVIDES THAT THE RIGHTS CONTAINED IN THAT ARTICLE SHALL BE EXERCISED IN CONFORMITY WITH THE LAWS AND REGULATIONS OF THE RECEIVING STATE, SUBJECT TO THE PROVISIO THAT THESE LAWS AND REGULATIONS MUST ENABLE FULL EFFECT TO BE GIVEN TO THE PURPOSES FOR WHICH THE RIGHTS IN QUESTION ARE ACCORDED. IF, FOR EXAMPLE, A PARTICULAR NATIONAL IS DETAINED IN A MAXIMUM SECURITY PRISON, IN WHICH ALL PRISONERS MAY BE VISITED ONLY UNDER THE CONDITION THAT A GUARD BE IN ATTENDANCE, DEPARTMENT DOES NOT FEEL THAT ANY VIOLENCE WOULD BE DONE TO RIGHTS OF DETAINEE OR CONSULAR OFFICER UNDER INTERNATIONAL LAW IF SUCH A SECURITY OFFICER IS IN THE SAME ROOM, WITHIN SIGHT, ALTHOUGH NOT NECESSARILY WITHIN HEARING, OF THE INDIVIDUALS INVOLVED. IN VIEW OF THE VARIETIES OF EXPERIENCES WHICH ARE POSSIBLE IN THIS REGARD, IT WOULD BE EXTREMELY DIFFICULT TO CONSTRUCT A DEFINITE RULE APPLICABLE UNDER ANY AND ALL CIRCUMSTANCES. (FOR AN INFORMATIVE STUDY ON THE GENERAL QUESTION OF THE RIGHT OF AN ARRESTED PERSON TO COMMUNICATE AND CONSULT WITH OTHERS, INCLUDING CONSULAR OFFICERS, FOR THE PURPOSE OF PROTECTING HIS INTERESTS, SEE UN ECOSOC STUDY E/CN.4 /966 23 JAN. 1969.)

3. FOR EMBASSY'S FURTHER ASSISTANCE, DEPARTMENT CITES THE RULES OF THE US DEPARTMENT OF DEFENSE, PROMULGATED IN 1968, CONCERNING THE RIGHT OF FOREIGN CONSULAR OFFICERS TO VISIT AND COMMUNICATE WITH THE NATIONALS WHO ARE SERVING IN THE US ARMED FORCES AND WHO HAVE BEEN CONFINED IN CONNECTION WITH COURT MARTIAL PROCEEDINGS. THESE REGULATIONS PROVIDE, IN PERTINENT PART AS FOLLOWS: "CONSULAR ACCESS RIGHTS. UNDER CIRCUMSTANCES REQUIRING NOTIFICATION, OR WHEN A FOREIGN NATIONAL IS CONFINED IN A MILITARY CONFINEMENT, THE CONSUL SHALL . . . HAVE THE RIGHT TO VISIT A FOREIGN NATIONAL WITHOUT DELAY. SUCH VISIT SHALL BE CONDUCTED IN ACCORDANCE WITH CONFINEMENT FACILITIES REGULATIONS, WHICH SHALL PERMIT REASONABLE ACCESS TO, AND THE OPPORTUNITY FOR PRIVATELY CONVERSING LIMITED OFFICIAL USE

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WITH THE FOREIGN NATIONAL . . . ."

4. WITH RESPECT TO THE MATTER OF THE TIME LIMIT IN WHICH NOTIFICATION OF CONFINEMENT OR DETENTION MUST TAKE PLACE, AS ALLUDED TO IN PARA 2, REF A, THIS IS AN ISSUE UPON WHICH THERE IS NO WIDESPREAD AGREEMENT INTERNATIONALLY. ARTICLE 36 OF THE VIENNA CONVENTION REQUIRES NOTIFICATION "WITHOUT DELAY" . . . . US EXPERIENCE IN THE PAST

HAS BEEN THAT THERE IS A VARIETY OF STANDARDS FOLLOWED BY DIFFERENT STATES CONCERNING THE LENGTH OF TIME IN WHICH NOTIFICATION MUST BE GIVEN THE SENDING STATE IN CASES INVOLVING THE DETENTION OR ARREST OF SENDING STATE NATIONALS. FOR THIS REASON, BILATERAL CONSULAR CONVENTIONS NEGOTIATED BY THE US DURING RECENT YEARS HAVE FOR THE MOST PART INCLUDED DEFINITE TIME LIMITS IN NUMBERS OF DAYS (E.G., TWO OR THREE) IN WHICH NOTIFICATION MUST BE MADE, AS WELL AS AN ADDITIONAL SPECIFIED NUMBER OF DAYS (E.G., THREE OR FOUR DAYS FROM THE TIME OF ARREST OR DETENTION) IN WHICH ACCESS MUST BE PERMITTED. IF EMBASSY WISHES TO CONSULT ANY OF THESE CONVENTIONS FOR FUTURE USE, DEPARTMENT WILL BE PLEASED TO SUPPLY COPIES THEREOF.

5. DEPARTMENT DEFERS TO EMBASSY'S JUDGMENT CONCERNING DESIRABILITY OF PRESSING INDIAN MFA ON ANY OF ABOVE DISCUSSED MATTERS. RUSH

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